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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

SHUFFLE MASTER, INC.

Plaintiff,

v.

YEHIA AWADA, and GAMING  
ENTERTAINMENT, INC.

Defendants.

GAMING ENTERTAINMENT, INC., and  
YEHIA AWADA,

Counterclaim-Plaintiffs,

v.

SHUFFLE MASTER, INC., and MARK  
YOSELOFF,

Counterclaim-Defendants.

CASE NO. CV-S-05-1112-RCJ-RJJ

**SHUFFLE MASTER'S REPLY BRIEF IN  
SUPPORT OF ITS EMERGENCY  
MOTION TO STAY BRIEFING ON  
DEFENDANTS' MOTION TO SEVER**

1 Defendants' Opposition to Shuffle Master's Emergency Motion To Stay Briefing  
2 On Defendants' Motion To Sever ("Opposition") misses the point of Shuffle Master's  
3 Emergency Motion To Stay Briefing On Defendants' Motion To Sever ("Motion to Stay  
4 Briefing"): staying briefing on Defendants' Motion to Sever the First Claim of Relief of  
5 Second Amended Counterclaim ("Motion to Sever") until after this Court rules on the  
6 pending summary judgment motion is the most efficient way to avoid unnecessary  
7 expenditures of party or judicial resources because if Shuffle Master's Motion for  
8 Summary Judgment No. 2 on Defendants' Counterclaims ("Summary Judgment Motion")  
9 is granted, at least as to Counterclaim I, then there is no reason to consider whether that  
10 counterclaim should be severed and consolidated with the '759 patent infringement case  
11 before Judge Sandoval. Specifically, if this Court rules in Shuffle Master's favor on the  
12 Summary Judgment Motion, the Motion to Sever will be moot. Argument on Shuffle  
13 Master's Summary Judgment Motion will occur within a matter of weeks and it would be  
14 wasteful to complete briefing on the Motion to Sever before determining whether there is  
15 anything left to sever.

16 Instead of addressing this key issue, Defendants reargue in favor of their Motion to  
17 Sever, arguing that both cases involve allegations related to the '759 patent, (Opposition  
18 at 2); the "two actions share common issues of fact and law," (*Id.* at 3); and that granting  
19 the motion to sever "place[s] the issues relating to the '759 patent all before Judge  
20 Sandoval." (*Id.*) However, as Shuffle Master will establish when it files its opposition to  
21 the Motion to Sever, Defendants' request is untimely and without merit. However, even if  
22 Defendants' Motion to Sever had merit, granting Shuffle Master's Motion to Stay Briefing  
23 is not dispositive of Defendants' Motion to Sever. If Shuffle Master's Summary Judgment  
24 Motion is denied as to Counterclaim I, then Defendants' Motion to Sever will be briefed,  
25 and, if this Court believes Defendants' arguments have merit, it may sever the  
26 counterclaim at that point—achieving the alleged efficiencies claimed by Defendants. If,  
27  
28

1 however, Shuffle Master's Summary Judgment Motion is granted as to Counterclaim I,  
2 these issues never need to be briefed or considered.

3 The only argument advanced by Defendants that remotely pertains to Shuffle  
4 Master's Motion to Stay Briefing is a false assertion that there is a possibility of  
5 conflicting decisions should this Court reach the merits of Shuffle Master's Summary  
6 Judgment Motion. Specifically, Defendants argue that Judge Sandoval has already been  
7 "fully and extensively briefed on the issues," (Opposition at 2), and the "very same issue"  
8 raised by Shuffle Master's Summary Judgment Motion is "presently before Judge  
9 Sandoval, and has been since April 2006." (*Id.* at 3.) As such, Defendants assert that  
10 briefing on Shuffle Master's Summary Judgment Motion should be stayed. (*Id.*)

11 However, the premise of Defendants' argument is wrong. Shuffle Master moved  
12 for summary judgment as to the antitrust claim in this case based on the fact that  
13 Defendants have failed to establish critical elements of the claim—namely, that Defendants  
14 will not be able to: (1) meet their burden of establishing the relevant market; (2) meet their  
15 burden to show that Shuffle Master has market power in the relevant market; and (3)  
16 show that Shuffle Master committed knowing and willful fraud in obtaining U.S. Patent  
17 No. 6,698,759 ("the '759 patent"). None of these issues are before Judge Sandoval.  
18 While alleged inequitable conduct during the prosecution of the '759 patent is before  
19 Judge Sandoval, the issues of deliberate and willful fraud (which Defendants must prove  
20 to succeed on the their Counterclaim I here, *Walker Process Equip., Inc. v. Food Mach.*  
21 *& Chem. Corp.*, 382 U.S. 172, 174 (1965)) are not. Indeed, the Federal Circuit has  
22 explained that a mere showing of "inequitable conduct," which can be sufficient to  
23 invalidate a patent, is insufficient to show knowing and willful fraud as required to prove a  
24 violation of Section 2 of the Sherman Act. *Argus Chem. Corp. v. Fibre Glass-Evercoat*  
25 *Co.*, 182 F.2d 1381, 1384-85 (Fed. Cir. 1987). Therefore, Judge Sandoval has not been  
26 briefed on the issues raised by Shuffle Master's Summary Judgment Motion and there is  
27

1 no risk that Judge Sandoval will render a ruling inconsistent with this Court's findings on  
2 those issues because they are simply not before Judge Sandoval.<sup>1</sup> Further, this Court need  
3 not render a decision on the additional issues which are before Judge Sandoval—  
4 inventorship or inequitable conduct—to grant Shuffle Master's Summary Judgment  
5 Motion. This Court is only considering whether there is sufficient evidence for a  
6 reasonable jury to conclude that Shuffle Master attempted to monopolize under Section 2  
7 of the Sherman Act. Which, as Shuffle Master set out in its Summary Judgment Motion,  
8 among other elements, requires that Defendants establish the relevant market, that Shuffle  
9 Master had monopoly power in that market, and that Shuffle Master committed knowing  
10 and willful fraud on the Patent Office.<sup>2</sup> (Summary Judgment Motion, at 6-18.) This  
11 Court need not consider the predicate question of inventorship or inequitable conduct to  
12 render its ruling as to this claim. Therefore, contrary to Defendants' incessant assertion,  
13 there is no jeopardy of inconsistent rulings.

14 \* \* \*

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21 <sup>1</sup> However, as stated in Shuffle Master's Motion to Stay Briefing, a ruling from Judge Sandoval  
22 that the '759 patent is valid would moot Defendants' antitrust counterclaim.

23 <sup>2</sup> The elements that Defendants must prove to establish their claim for attempted monopoly  
24 under Section 2 of the Sherman Act are that Shuffle Master "(1) had a specific intent to  
25 control prices or destroy competition; (2) engaged in predatory or anticompetitive conduct to  
26 accomplish the monopolization; (3) had a dangerous probability of success in monopolizing the  
27 market; and (4) caused an antitrust injury." *Pac. Express, Inc. v. United Airlines, Inc.*, 959  
28 F.2d 814, 817 (9th Cir. 1992). The relevant market and power in that market are elements of  
proof under element (3). (*See* Summary Judgment Motion, at 6, 8-11.) Knowing and willful  
fraud on the Patent Office is an element of proof under element (2). (*Id.* at 11-14.)

1 Accordingly, the Court should exercise its discretion and grant Shuffle Master's  
2 Emergency Motion to Stay Briefing on Defendants' Motion to Sever.

3  
4 Dated: February 2, 2007

Respectfully submitted,

6 /s/ Barry F. Irwin

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of February, 2007, a true and correct copy of the foregoing, **SHUFFLE MASTER'S REPLY BRIEF IN SUPPORT OF ITS EMERGENCY MOTION TO STAY BRIEFING ON DEFENDANTS' MOTION TO SEVER**, was served via the Court's ECF notice:

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